RECORD
AND
BRIEFS

Nos. 09-958, 09-1158, 10-283

In The Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR
CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES,
PETITIONER

v.

INDEPENDENT LIVING CENTER OF SOUTHERN
CALIFORNIA, INC., ET AL.

AND

CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

AND

SANTA ROSA MEMORIAL HOSPITAL, ET AL.

ON WRITS OF CERTIORARI TO THE
UNITED STATES SUPREME COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES, NATIONAL COMMUNITY PHARMACISTS ASSOCIATION, NATIONAL ALLIANCE OF STATE PHARMACY ASSOCIATIONS AND THE AMERICAN PHARMACISTS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Supremacy Clause supports an equitable cause of action under the Constitution, to prevent injury to Medicaid beneficiaries and providers, by enjoining state officials to refrain from implementing state legislation that contravenes 42 U.S.C. § 1396a(a)(30)(A) of the federal Medicaid Act.

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INTEREST OF *AMICI CURIAE*[1]

Amici—the National Association of Chain Drug Stores, the National Community Pharmacists Association, the National Alliance of State Pharmacy Associations, and the American Pharmacists Association—are national pharmacy and pharmacists associations whose members include national and community pharmacy providers who serve Medicaid beneficiaries.

In this case, the Court will decide whether the U.S. Court of Appeals for the Ninth Circuit correctly held that the Supremacy Clause provides a private right of action to third parties to challenge State laws preempted by federal law. The associations represent providers who participate in the Medicaid Program and who would be adversely impacted if the Court foreclosed their ability to challenge State action that is preempted by federal law, particularly as it relates to the Medicaid Program. For these reasons, *amici* have a substantial interest in this case and a unique perspective on its proper resolution.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. Other than *amici curiae*, their members, or their counsel, no party made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Medicaid is a joint federal and State program created under Title XIX of the Social Security Act to provide health care coverage to indigent and otherwise disadvantaged Americans in States that voluntarily elect to participate. 42 U.S.C. § 1396 *et seq.* Federal and State government agencies share responsibility for funding Medicaid. *Id.* § 1396a(a). Each State administers its own Medicaid program in accordance with federal and State law and pursuant to a Medicaid State Plan which the United States Department of Health and Human Services Centers for Medicare and Medicaid Services ("CMS") reviews and approves. 42 C.F.R. § 430.10 *et seq.* States participating in the Medicaid program may provide coverage for pharmacy services. 42 U.S.C. § 1396a. All fifty States have chosen to do so.

In order to comply with federal law, a State which chooses to participate in the Medicaid program must comply with the "quality of care" clause of 42 U.S.C.§ 1396a(a)(30)(A), which provides in pertinent part:

> A state plan for medical assistance must— . . . provide such methods and procedures relating to the utilization of, and payment for, care and services available under the plan . . . as may be necessary. . . to assure that payments are consistent with efficiency, economy, and quality of care . . . .

42 U.S.C. § 1396a(a)(30)(A) ("Section 30(A)").

A State Medicaid program must also comply with the "access" clause of Section 30(A), which provides in pertinent part:

> A state plan for medical assistance must— . . . provide such methods and procedures relating to the . . . payment for, care and services available under the plan . . . as may be necessary. . . to assure that payments . . . are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . .

Id.

When States change how they set rates for Medicaid reimbursement to reduce the costs of their Medicaid programs, they frequently reduce payment rates to providers of medical services to Medicaid enrollees. Although Medicaid beneficiaries suffer the greatest injuries when States reduce payment for services because they lose access to needed care, providers are often the first to suffer the associated financial consequences. These reductions, when made without any analysis of their corresponding impact on providers and beneficiaries, run afoul of Section 30(A). *See* Medicaid Program; Methods for Assuring Access to Covered Medicaid Services, 76 Fed. Reg. 26342 (proposed May 6, 2011) (to be codified at 42 C.F.R. pt. 447). Therefore, if the law setting rates does not provide payments sufficient to assure "access" and "quality of care," federal law,

pursuant to the Supremacy Clause of the United States Constitution, preempts that State law.

Principles of federalism mandate the supremacy of federal law. This Court has long assumed that there is a generally available right of action for preemption claims not derived directly from statute or from 42 U.S.C. § 1983 but from the Constitution. This Court should now expressly recognize that preemption claims brought under the Supremacy Clause are necessary to assure the supremacy of federal law.

ARGUMENT

I. The Federal Constitution Is the Supreme Law of the Land

Federalism is a system of government in which power is divided and shared among a national government, state governments, and local governments. The States agreed to a federalist model of government when they ratified the United States Constitution. Under the federal constitution the States affirmatively ceded certain powers to the federal government while retaining others. Article VI, clause 2 of the federal constitution (the "Supremacy Clause") guarantees the national union of the States by mandating that the Constitution, federal laws, and treaties take precedence over State law and binds all judges to adhere to that principle in their courts. Specifically, the Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

> made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

James Madison in advocating for ratification of the Constitution argued that the Supremacy Clause was necessary because State legislatures were invested with all powers not specifically defined in the Constitution. Therefore, absent the Supremacy Clause, the federal constitution would be subservient to various State constitutions. The Federalist No. 44, at 180-84 (James Madison) (Wilder Pub. 2008). In further support of the Supremacy Clause, he argued "as the constitutions of the States differ much from each other, it might happen that a treaty or national law, of great and equal importance to the States, would interfere with some and not with other constitutions, and would consequently be valid in some of the States, at the same time that it would have no effect in others." *Id.* at 183. Madison concluded that this would lead to an inverse result with a national government ruled by the States or "a monster, in which the head was under the direction of the members." *Id.* Accordingly, the Supremacy Clause was needed to clearly delineate the competing authorities of the federal and State governments, and by ratifying the United States Constitution the States agreed that in cases of conflict between federal and State law, federal law is supreme.

II. There Is a Cause of Action Under the Supremacy Clause of the Constitution

Alexander Hamilton also defended the Supremacy Clause, stating "[a] *law*, by the very meaning of the term, includes supremacy" because "[i]t is a rule which those to whom it is prescribed are bound to observe." The Federalist No. 33, at 123 (Alexander Hamilton) (Wilder Pub. 2008). If laws were not supreme "[i]t is evident they would amount to nothing." *Id.* Thus, although laws by their nature imply their supremacy, the Supremacy Clause assures that federal laws will be properly executed and will take priority over conflicting State laws. Accordingly, the drafters of the United States Constitution believed that the Supremacy Clause was necessary so that the States affirmatively acknowledged the supremacy of federal law. By ratifying the United States Constitution the States agreed to the supremacy of federal law against conflicting State laws. For the Supremacy Clause to have any meaning, there must be a private right of action to address situations when States enact laws which conflict with federal law.

A. This Court Has Long Recognized a Cause of Action Under the Constitution.

While this Court has refused to imply a cause of action in federal statutes, the Court has consistently recognized causes of action under the United States Constitution. In *Davis v. Passman*, 442 U.S. 228 (1979), Justice Brennan set forth an exposition of jurisdiction, standing, cause of action, and remedies:

> Thus it may be said that *jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case, *see Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 384 (1884); *Montana-Dakota Utilities Co. v. Northwestern Public Serv.* Co., 341 U. S. 246, 249 (1951); *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction, *see Warth v. Seldin*, 422 U. S. 490, 498 (1975); *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the "preconditions" for such equitable remedies. *See Trainor v. Hernandez*, 431 U. S. 434, 440-443 (1977).

Id. at 239 n.18. In *Davis*, the Court was asked to determine whether the U.S. Court of Appeals for the Fifth Circuit correctly determined that a cause of action and a damages remedy did not exist under the

Constitution for violations of the Due Process Clause of the Fifth Amendment. *Id.* at 230. In reversing the Court of Appeal's decision, this Court held that the Court of Appeals used the wrong criteria to determine whether the petitioner should be able to enforce the Fifth Amendment's Due Process Clause. The Court explained that the Court of Appeals erred by applying the "criteria set out in *Cort* v. *Ash*, 422 U. S. 66 (1975), for ascertaining whether a private cause of action may be implied from 'a statute not expressly providing one.'" The Court noted that "the question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Id.* at 241-43.

Instead, this Court found that there is a cause of action in the Constitution to enforce constitutional rights, with jurisdiction conferred by the federal question statute. *Id.* The Court noted that:

> [t]he Constitution . . . does not 'partake of the prolixity of a legal code.' *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819). It speaks instead with a majestic simplicity. One of 'its important objects,' *ibid.*, is the designation of rights. And in 'its great outlines,' *ibid.*, the judiciary is clearly discernible as the primary means through which these rights may be enforced.

Similarly, this Court has recognized a cause of action in cases which assert that federal law preempts a conflicting State law or regulation.

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U.S. 123, 160-162, 28 S.Ct. 441, 454-455, 52 L.Ed. 714 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. See *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-200 (1921); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U.S. 149, 152, (1908); *see also Franchise Tax Board*, ante, at 19-22 and n. 20; Note, *Federal Jurisdiction Over Declaratory Suits Challenging State Action*, 79 Colum. L. Rev. 983, 996-1000 (1979). This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture. See, *e.g.*, *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983).

Since *Shaw*, this Court has recognized a cause of action where a plaintiff seeks prospective declaratory or injunctive relief under the Supremacy Clause to prevent State legislators from enacting laws preempted by a federal statute. This Court has decided the merits of these preemption cases without addressing whether the allegedly preemptive federal statute grants a private right of action to the plaintiff. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (tobacco manufacturers and retailers sued Massachusetts to enjoin enforcement of State cigarette advertising restrictions on the ground that the federal Cigarette Labeling and Advertising Act preempts State regulation); *United States v. Locke*, 529 U.S. 89 (2000) (United States alleges that Washington State statute governing the design of oil tankers is preempted by federal statute); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (National Foreign Trade Council sues to enjoin enforcement of Massachusetts law that barred procurement from companies that did business with Burma on preemption grounds); *Foster v. Love*, 522 U.S. 67 (1997) (Louisiana voters challenge State law governing elections as being preempted by federal election statute). Like *Davis v. Passman*, these cases demonstrate that this Court will permit injunctive or declaratory relief on a basis of federal preemption without regard to whether the federal statute provides a private right of action.

This Court's preemption analysis was set forth in *Verizon Maryland., Inc. v. Pub. Serv. Comm'n. of Maryland*, 535 U.S. 635 (2002). In *Verizon*, this Court unanimously reached the merits of a preemption claim while "express[ing] no opinion"

whether there was a private cause of action to enforce the federal telecommunications law even though the State argued that there was no private cause of action in the statute, and therefore, no jurisdiction for the suit. This Court responded to the State's challenge by stating:

> We need express no opinion on the premise of this argument. "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."

Id. at 642-43 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)).

This Court found that nothing in the 1996 Telecommunications Act "purports to strip [federal question] jurisdiction." *Id.* at 643. Rather, this Court concluded: "[i]n sum, nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies." *Id.* at 644. Therefore, this Court found that federal question jurisdiction existed, because the law "does not distinctively limit the substantive relief available." *Id.* Specifically, this Court stated that as long as the plaintiff's preemption claim is not frivolous, the district court has federal question jurisdiction to determine whether a State regulation is preempted by federal law, pursuant to the Supremacy Clause. *Id.* at 643. As such, this Court summarily dismissed

the argument that the lack of a cause of action could affect the federal judicial power to adjudicate the plaintiff's preemption claim.

Similarly, in two subsequent Medicaid decisions, this Court reached the merits of preemption questions by assuming, without discussion, the existence of a cause of action. For example, *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003) (hereinafter "*PhRMA*"), concerned whether Maine's prescription drug law was preempted by the federal Medicaid statute. In that case, PhRMA sought to enjoin Maine officials from implementing a drug rebate program devised to obtain discounted drug prices for persons not covered by Medicaid. Under the terms of the program, pharmaceutical companies that refused to participate in Maine's drug rebate program were required to submit their drugs to prior authorization procedures under the State's Medicaid Program. *Id.* at 649-50. This Court "assumed *sub silentio* that the plaintiff had a right of action for its claim that the Medicaid statute preempted state law." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 374 (2004).

In a second Medicaid case, *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), this Court unanimously held that an Arkansas statute requiring Medicaid applicants to assign to the State the entirety of any settlement violates the federal Medicaid law's "anti-lien statute," and that the State may recover only from those portions of third party awards allocated for medical expenses. This Court unanimously held

that State law conflicted with federal law and was therefore unenforceable under the Supremacy Clause. Again, as in the *PhRMA* case, this Court reached the merits of the preemption claim without addressing the issue of federal jurisdiction, which was presumed.

B. Principles of Federalism Support a Cause of Action Under the Supremacy Clause

The presumption in favor of a cause of action under the Supremacy Clause is justified by the federal interests underlying the Supremacy Clause—the supremacy of federal law and the need to keep State officials within the bounds of the federal law. Without a cause of action under the Supremacy Clause there would be limited means to address systemic violations of federal laws by State officials. The federal government has finite litigation resources and cannot effectively monitor each State's law to assure that it does not conflict with federal law.[2] Absent judicial resolution of preemption claims, States would presumably continue to enforce

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[2] To expect the federal government to monitor all State laws to assure that there is no conflict would impose exactly the federal "negative" option which the Convention rejected. *See*, Brief of the Nat'l Governors Assoc et al. as Amici Curiae in Support of Petitioner, p. 15-17. Rather, recognizing a private cause of action under the Supremacy Clause assures that the power of State legislatures to pass needed legislation is only intruded upon when that legislation conflicts with federal law and the State law has imposed a "concrete, particular, and redressable" injury on a party.

laws which conflict with federal laws.[3] Allowing third parties to bring preemption claims is consistent with federal supremacy and the goal of keeping State and federal law in harmony.

As this Court recently stated, "'[F]ederalism secures to citizens the liberties that derive from the diffusion of federal power.'" *Bond v. United States*, 564 U.S. __, No. 09-1227, slip. op. at 9 (June 16, 2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.
>
> The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset

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[3] This case is a prime example. Absent a private cause of action under the Supremacy Clause that provided an entry to federal court, California claims that it could have implemented AB 5 and AB 1183 before and even after HHS found the reductions mandated by AB 5 and AB 1183 did not comply with federal law.

> the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

Bond, at 9-10.

> If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.
>
> Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism.

Id., at 11 (citations omitted).

If Petitioner's views prevail, citizens would lose the ability to challenge State laws that conflict with federal laws. As the Court noted in *Davis v. Passman*, actions premised on a violation of the Constitution are distinct from private causes of action brought against private defendants. With respect to private actions, this Court made clear in *Cort v. Ash*, *supra*, that there is a presumption against a statutory implied right of action for claims against private defendants; however, in *Davis v. Passman*, *supra*, this Court drew a clear distinction

between implied causes of actions for violations of statutes as opposed to violations of Constitutional protections. The distinction is logical since actions against private defendants charged with federal statutory violations do not implicate any competing State interests. Thus, the *Shaw* preemption cases, discussed *supra*, which permit injunctive relief only against State officials, can be justified by principles of federalism and federal supremacy objectives whereas suits against private defendants do not serve the same objectives.

Moreover, a right of action under the Supremacy Clause does not violate Constitutional separation of powers principles. In contrast to the legislature's proper role of providing enforcement mechanisms for statutory rights, developing constitutional remedies is largely a judicial function. Based on this Court's consistent acceptance of preemption claims, Congress may very well have rightly assumed that an express cause of action for preemption of State laws is unnecessary because the existing jurisprudence provides injunctive relief in successful preemption cases, regardless of whether the underlying federal statute provides an express cause of action. Any claim that Congress must establish a cause of action before an individual can "challenge a law as enacted in contravention of constitutional principles of federalism" lacks merit. *Bond*, slip. op. p. 11. "The Supremacy Clause on its face makes Federal law 'the supreme Law of the Land' even absent an express statement by Congress." *Pliva v. Mensing*, 564 U.S. __, No. 09-993, slip op. at 14 (June 23, 2011) (quoting U.S. Const., art. VI, cl. 2.).

In sum, recognition of a cause of action under the Supremacy Clause is justified by federal supremacy and rule of law objectives and ensures that State and local government officers do not systematically violate federal statutes.

III. A Cause of Action Under the Supremacy Clause Is Particularly Important in Medicaid Cases

If this Court determines that the Supremacy Clause does not provide individuals with a private cause of action, then individuals will have no judicial recourse in cases where federal law preempts laws enacted by State legislatures. For instance, the genesis of these consolidated cases are actions taken by California in 2008 with regard to its Medicaid Program which illustrate the importance of expressly affirming a private right of action under the Supremacy Clause. Among other rate reductions, California attempted to institute a ten percent rate reduction for pharmacy services. Assembly Bill 5, 3d extraordinary sess. (Cal. 2008) ("AB 5") (No. 09-1158, Pet. App. 190-97.) AB 5 never went into effect due to the preliminary injunction entered by the district court premised on a finding that respondents had a private right of action under the Supremacy Clause. California then adopted a five percent reduction on pharmacy reimbursement. Assembly Bill 1183 (Cal. 2008) ("AB 1183") (No. 09-1158, Pet. App. 198-217). The AB 1183 reductions also never went into effect and have been superseded by subsequent legislation. *See* No. 09-1158, Pet. Br. at 9 n.3.

Nearly two years after the State enacted AB 5 and AB 1183, CMS rejected the rate reductions set forth in AB 5 and AB 1183, because California could not demonstrate that the rate reductions mandated by AB 5 and AB 1183 would permit California to meet the access and quality of care provisions of the Medicaid Program. No. 09-958, Gov't Pet. Br. App. 1a-4a.

Pharmacists and pharmacies such as the members of the Associations providing this *amicus* brief are on the front line of providing healthcare services to Medicaid beneficiaries. They serve those who are "most impoverished and who -- because of their physical characteristics [are] often least able to overcome the effects of poverty." *Swiker v. Hogan*, 457 U.S. 569, 590 (1982). "These people are the most needy in the country and it is appropriate for medical care costs to be met, first, for these people." *Id.* (internal quotation marks and citations omitted). It is in the public interest that those with the resources, the incentive, and who suffer an injury that is concrete, particular, and redressable, such as providers, have a means by which they can seek to assure that States do not pass State laws which conflict with federal law intended to protect "the most needy in the country." *Id.* at 572.

A recent study of Oregon's Medicaid Program further evidences the importance of the Medicaid Program. The Study found that as compared to people without insurance, individuals on Medicaid received better health care, prescription drugs and physician visits. Finklestein et al., The Oregon Health Study Group, *The Oregon Health Insurance Experiment: Evidence from the First Year* at 5

(2011), *available at* http://www.nber.orgs.papers/w17190. Although there was a short-term cost to providing care to additional beneficiaries, the long-term effects of access to Medicaid Programs seem to be a healthier, more productive population, which may have less need for costly medical services in the future. *Id.* at 7.

Despite the proven benefits of Medicaid Programs on beneficiaries long-term health, States continually jeopardize the Medicaid Program by reducing providers' rates to unsustainable levels. For example, in spite of the steep reductions envisioned by AB 5 and AB 1183, California planned, contrary to the plain language of the Medicaid regulations, to implement the payment reductions mandated by AB 5 and AB 1183 absent CMS approval. 42 C.F.R. § 430.12(c). Thus, absent a cause of action pursuant to the Supremacy Clause, a State law which CMS subsequently found conflicted with federal law because it failed to assure "access" and "quality of care" for Medicaid beneficiaries would have been in effect for over two years with the consummate loss of "access," "quality of care," and degradation of health among some of the country's most vulnerable. The cause of action the State claims does not exist provided the means for assuring that the improper rate reductions did not happen.

IV. This Court Has Distinguished Between Causes of Action Under the United States Constitution and Those Claims Brought Under 42 U.S.C. § 1983

Petitioners contend that individuals cannot invoke the Supremacy Clause when State law conflicts with federal law unless the statute provides a private cause of action enforceable under 42 U.S.C. § 1983. *See* No. 09-1158, Pet. Br. at 20-26. This argument is not consistent with the different reasoning applied by this Court in analyzing preemption claims under the Supremacy Clause and claims brought under § 1983. Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under color of State law. In *Cort v. Ash*, this Court enunciated a four-part test to determine whether Congress intended to imply a right to sue directly under a federal statute. In general, a plaintiff asserting such a right is required to show that (1) membership in the class for whose benefit the statute was enacted, (2) evidence of Congress' intent to confer a private remedy, (3) that a right to sue would be consistent with the statutory purpose, and (4) that the cause of action is not one traditionally relegated to the States to a degree that implying a right to sue would be inappropriate. 422 U.S. 66, 78-79. Under this doctrine, a plaintiff must show that Congress intended to grant both a private right and a private remedy. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

While cases brought under 42 U.S.C. § 1983 are required to meet the Court's stringent "rights"

requirement, this Court enunciated a different analysis for claims alleging a constitutional violation. In *Verizon, supra*, this Court made an important distinction between claims brought under 42 U.S.C. § 1983 for violations of federal statutes or laws and preemption claims brought under the Supremacy Clause. In *Verizon* this Court found that the existence of a statutory cause of action was not relevant to court access. Instead, this Court emphasized in *Verizon* the absence of evidence that Congress intended to foreclose judicial review in cases alleging preemption under the Supremacy Clause. *Id.* at 643-644. The less stringent analysis for cases involving conflicts between federal and State laws adopted in *Verizon* is entirely consistent with federal supremacy and rule of law mandates.

Claims which rest on the Supremacy Clause address, through injunctive relief, a systematic conflict between State and federal laws thereby supporting the federal structure. In contrast, claims brought under 42 U.S.C. § 1983 provide damages to address ad hoc violations of federal law by State officials in executing their official duties. Plaintiffs who suffer ad hoc violations generally do not have standing for prospective injunctive relief because the violations are not ongoing. Conversely, preemption claims under the Supremacy Clause may only be brought for an ongoing conflict between federal law and State law. Thus, the Supremacy Clause creates a private cause of action solely for injunctive relief that addresses systemic violations of law by the States whereas the more appropriate function of § 1983 is to provide damages to address ad hoc violations of law by State officials.

V. Petitioners' Fiscal Arguments Are Not a Basis to Deny a Cause of Action Under the Supremacy Clause

States argue that they will be injured or somehow harmed if they cannot effectively fiscally manage their State Medicaid Programs. This is a red herring. Requiring a State not to enact legislation which conflicts with federal law even when administering its Medicaid Program is not an undue hardship. States voluntarily participate in Medicaid and voluntarily offer pharmacy services. It is disingenuous for States to say they want the fruits of participation in a federally financed program but can pass State laws which conflict with the rules Congress has imposed on that participation.[4] Moreover, as this Court has explained:

> [T]he fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable

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[4] More broadly stated, the States want the benefit of joining the Union, without the risk that a person within the State would successfully seek to enforce that Supremacy of federal law.

> consequence of the principle announced in *Ex parte Young*.

Edelman v. Jordan, 415 U.S. 651, 667-68 (1974).

Depriving individuals of a cause of action to challenge a State law that conflicts with federal law when that law causes them a "concrete, particular, and redressable" injury would strip individuals of the ability to "challenge a law as enacted in contravention of constitutional principles of federalism." *Bond*, slip op. at 11. That such a challenge may affect a State treasury is simply irrelevant.

VI. This Court Should Not Treat Laws Enacted Pursuant to the Spending Clause Differently from Other Federal Laws

While the courts of appeals have uniformly applied *Verizon* in Spending Clause cases, some have claimed that Spending Clause statutes are to be treated differently from other laws. This argument is based on a contract analogy introduced in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) suggesting that Spending Clause statutes function in a manner similar to contracts between the federal and State governments in that federal funds are conditioned on compliance with federal mandates.

This argument has no basis in the text of the Constitution. The Supremacy Clause applies to all federal statutes; nothing in the text of the Constitution limits the scope of the Supremacy Clause for statutes enacted under the Spending Clause. Like all other statutes, laws enacted

pursuant to Congress's power under the Spending Clause are "supreme federal law" that trump State and local laws. This makes perfect sense because federal law is "'the supreme Law of the Land' even absent an express statement by Congress." *Pliva*, slip. op. at 14.

Pennhurst used the contract analogy in concluding that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. This principle has been extended to apply to questions of statutory interpretation that affect the amount of the State's financial responsibilities, so that a State must have "clear notice regarding the liability" imposed by the statute. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Permitting private parties to bring a cause of action under the Supremacy Clause would not impose a new condition upon States receiving Medicaid funds. First, the Medicaid statute clearly conditions the grant of federal funds on the State complying with the Medicaid Act's requirements, including the requirements set forth in Section 30(A). Second, the judicial remedy for federal law preemption is an injunction against the ongoing violation. This remedy is standard, and therefore, States have historically been on notice that Courts will enjoin State laws which conflict with federal law.

In sum, assertions based on contract law are not only dubious, but also are irrelevant to preemption claims. Preemption is not based on assent to contract terms but rather on the States' affirmation of the Constitution making federal law supreme. Numerous scholars, as well as courts of appeals,

have pointed out that the applicable cause of action to bring preemption claims is inherent in the Supremacy Clause, just as courts have recognized causes of action to enforce other constitutional provisions. *See, e.g.*, *Planned Parenthood of Houston & Southeast Texas v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005); *Local Union No. 12004, United Steelworkers of Am. v. Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004); *see also Sloss*, 89 Iowa L. Rev. at 363. As a result, no additional cause of action is needed in any statute to bring a Supremacy Clause preemption claim, no matter whether its source of congressional authority is the Spending Clause, the Commerce Clause, or any other Constitutional Clause.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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